

## BOOK REVIEWS

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**Monopolies and Patents.** By Harold E. Fox. Toronto: University of Toronto Press, 1947. Pp. xxv, 388. \$10.00.

Probably no field of law as important to modern industrial economy has such a sparse historical and critical literature as that governing patents for inventions.

Fox's book, described by the author as *A Study of the History and Future of the Patent Monopoly*, is a competent and valuable contribution to that literature. The author never conceals the object of the book, to present an argument to eliminate "the confusion attendant upon the definition of invention in the law of patents"—a confusion ascribed to the "wide divergence of views which have been held in the patent offices on the one hand, and the courts of law on the other, on the subject of inventive ingenuity."

With this aim the author found himself inevitably concerned with the historical antecedents of patents and the early squirmings of society against the pressures of monopolies. Fox goes boldly back into the 16th-century controversies over monopoly and in the first two-thirds of his book, except for a resume of his argument and purpose, confines himself largely to a study of the origins and decline of the monarchically created monopolies of early England.

The profession of the author's purpose is brief. He argues ably that the vitality of modern industrial life owes much to the incentives and protection provided by the monopolies inherent in the grants of patents for inventions, the only type of monopoly (besides that of copyright) that kept its friends and its legitimacy throughout the bitter controversies that marked the parliamentary battles over monopoly. The history of these controversies Fox has reported interestingly and compactly, together with the earlier background of Roman and other continental experiences with monopoly.

Fox's selection and representation of the materials of this study present no grounds of quarrel. His deductions and conclusions frequently seem to leap beyond the foundations for them; for example, contemporaneous and earlier continental grants of patents for inventions challenge the statement that, "The development of a patent system arising from the grant of exclusive privileges as a stimulation to invention and industrial expansion required a combination of factors which, during the Middle Ages, was present only in England."

More soundly Fox demonstrates that the patent for invention was not a by-product of the Statute of Monopolies (1624) but was an earlier child of the common law preserved against extinction by that Act's declaration of the common law and delineation of the limitations of such grants. The invention first protected was, of course, not the patentee's original contribution of a new article, machine, or method, but the mere introduction of an industrial skill from abroad. Vestiges of this system remain in the British patent law today, doubtless as a tribute to the inestimable contribution of this device to England's industrial development and temporary preeminence.

Fox also traces the evolution of the monopoly grant from a mere franchise excepting the grantee from local prohibitions and restrictions to a true monopoly empowering the patentee to exclude others from the practice of the prescribed inventions.

After an extended statement of the monopoly agitation through "the murmuring Parliament of Queen Elizabeth, the mutinous Parliament of James I, and the rebellious Parliament of Charles I," Fox attempts an appraisal of the monopoly system and resolutely concludes that it was of incalculable value for its "inventive and industrial encouragement," was legal in its inception, did not enrich the Crown, and expressed an entirely proper economic policy. The abuses of specific monopolies he makes no apology for. "In principle," says Fox, "little distinction can be drawn between the sulphur and saltpetre monopolies of the Elizabethan and Stuart periods and the monopolistic control of atomic energy at the present time." It may depend on who draws the distinction, and upon what grounds. Even with our present facilities for communication and the complete freedom for parliamentary debate, atomic energy monopolization has not created half the furore that arose against the Elizabethan and Stuart monopolies when communication was difficult and criticism of the sovereign in Commons an enterprise of some risk.

The second part of the book deals with the corruption of the term "invention" from its original concept of merely a new manufacture to its present judicial concept of a contribution of marked originality far above any standard of novelty alone. In approaching this question Fox falls into the familiar error, apparently first expressed by Webster, that a patent "takes nothing away from the public," although Fox expressly restates the essential feature of the patent which distinguishes it from the copyright, that the patentee "can prevent the exercise of that invention by anyone else who has, quite in the belief that he was actually inventing something new, and without knowledge of the patentee's patent, invented the same thing, even simultaneously with the patentee." To recognize this power in the patentee, an essential characteristic of a patent system, in no way compromises the evaluation of a patent system in an industrial economy, although it obviously does weaken the analogies to copyright, where the grantee possesses merely the power to prevent copying.

The book presents an adequate analysis of the British, Canadian, and United States decisions in which the courts have introduced the "complicated doctrine whereby the subject of the patent, the thing which is to be protected, must, before a valid patent can be granted in respect thereof, be possessed of a mystical, indefinable quality known as invention." That doctrine came into the British law in 1835, into the United States law by the Supreme Court case of *Hotchkiss v. Greenwood* in 1850, and into the Canadian law in 1870. Fox directs his argument toward undoing the effects of this doctrine.

The author presents a tabulation of all the Canadian patent cases since 1867 and all of those decided in the House of Lords from 1884 on, to demonstrate the complete lack of unanimity of the judges upon the question of invention and "as showing something of the impossibility of eliminating judicial arbitrariness in deciding the question of invention without the use of a fixed and defined standard." He then reviews the solutions proposed by others for the problem. One suggests a broadening of the chancellor's discretion to vary the relief according to the value of the inventor's contribution to the art, which the author rejects as but allowing "further scope for judicial discretion." Judge Frank suggests the long debated device of granting two kinds of patents, petty or "gadget" patents, and those requiring relatively large sums to complete and exploit—a classification based upon the theory of necessity of investment, which the author rejects as faulty in that the capital requirements of exploiting an invention have no measurable relation to the importance of the contribution.

The suggestion that the question of invention be remitted from the courts to an administrative tribunal for revaluation, made by the United States National Patent Planning Commission, combined with its suggestion of the "declaration of policy that patentability shall be determined objectively by the nature of the contribution to the advancement of the art, and not subjectively by the nature of the process by which the invention may have been accomplished," Fox embraces as "the beginning of a new era in patent thinking." The resolution of the problem by the dubious expedient of transferring decisions, as has often been proposed, from courts to a bureau lacks not only novelty but merit. The bureau much more quickly freezes its concepts and approach into a liturgy of rules and principles under which the reasoning and need which generated them are very early forgotten. The argument that bureau personnel will offer improvement in technical competency over that of the courts can readily be met by the other suggestion embraced by Fox that courts be provided with independent expert technical assistance, as is readily available under Rule 53, Federal Rules of Civil Procedure, and as has been proposed in England by the Swan Committee. As to the hope Fox finds in a declaration of policy with respect to the test of invention, that policy is and has been for many years largely the basis of patent decisions, and only occasional departures therefrom reflect the rejected test stated in the proposed statement of policy. In any event, any declaration of policy as that stated makes no improvement over the initial problem of defining invention. What is needed is some recognition of the difficulties of evaluating, *ex post facto*, the problem to which a patented invention is directed, in which the average patent gives little help, and then determining whether the patented solution actually represents qualities of creation beyond the skill of the profession or trade in which the invention appeared. The problem is complicated by the claiming practice common here and in England, where the invention may be specifically disclosed and categorically claimed, with a resultant frequent reach of the patentee for an interpretation of his claims that would embrace specific forms of his invention never contemplated by him. Fox overlooks this in the repeated statement that "The orbit of protection granted by a patent monopoly is coincident and coterminous with the orbit of the subject matter."

Fox goes to the French patent law for his solution. In France there is no requirement of invention as has been judicially imposed in the English-speaking countries. All that the French law requires is that the invention "is new and is of an industrial character." In construing the French patent the courts free themselves from claims drawn by the patentee and attempt to define the actual contribution of the patentee and then look to see whether that has been appropriated. Fox seemingly overlooks the broadened judicial discretion which this involves.

What Fox is really attacking is a legal concept of "invention" that has grown up in the judicial decisions to moderate the increasing power granted to a patentee by contemporary industrial growth and the lag of bureau recognition of this phenomenon. That course of legal decision can no more be reversed than the history which evoked it. If, as seems recurrently indicated, this results in such a weakening of the patent system as to reduce its value to industrial society legislative correction may be needed. A study of that possibility is now indicated. The problem is not a simple one. Fox has ably dissected it, however ineffective his proposed remedies appear.

The book closes with Appendices including The Merchant Tailors' Case, List of Monopolies in 1601, List of Monopolies Granted by Queen Elizabeth, The Case of

Monopolies, The Case of Penal Statutes, List of Grievances Presented By The House of Commons to James I, The Book of Bounty of James I, Proclamations of James I, The Statute of Monopolies, Proclamation of Charles I, Article of Impeachment Against Strafford, Oral Defence of Earl of Strafford, Reply for the Prosecution, The Great Case of Monopolies, an excellent bibliography and a good index.

CASPER W. OOMS\*

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**Criminal Justice and Social Reconstruction.** By Hermann Mannheim. New York: Oxford University Press, 1947. Pp. 290. \$4.00.

In this book the author, a former Berlin magistrate and prolific writer on matters of criminology, undertakes to examine the "values" underlying criminal law and to consider whether the law adequately meets these values. More specifically he first asks, "Why are certain acts criminal?" To answer that they are anti-social is not enough. While all crimes are anti-social, there are great areas of anti-social conduct that are not criminal, either because the acts are not deemed serious enough or because, for one reason or another, the criminal law does not seem the best tool with which to attack them. Whether or not certain anti-social conduct shall be denominated "criminal" and, if so, how serious a crime the conduct shall constitute, are matters of "value" as the author uses that term.

These values have undergone far more change than superficially might be expected. While homicide has always been a crime, we no longer give any value to the method of killing, viz., whether secret or open and brutal. In Anglo-Saxon days, when family vengeance was a sacred duty, a secret killing was a much more serious crime because of the uncertainty as to who the doer was. Surprisingly the author fails to mention another old-time value—the identity or race of the person killed. In the time of King Canute it was a far more serious crime to kill a Dane than it was to kill an Englishman. And, realistically, who today would say that the race or color of the victim was unimportant, in, for example, Greenville, South Carolina? A curious gap in this part of the discussion is the author's complete failure even to mention the importance, if any, of necessity or compulsion as the reason for killing (e.g., *The Queen v. Dudley and Stephens*,<sup>2</sup> where two sailors, adrift on a raft in mid-Atlantic, killed and ate a third). On the other hand suicide, mercy killing, and euthanasia receive searching and interesting treatment.

Certain values, the author forcefully argues, are rated far too highly, prevailing, by most of the world's legal systems, while others are conversely rated too low. Simple larceny, he contends, is made too much of; it is the little man's crime and the law, administered by the more fortunate, always overvalues the magnitude of his transgressions. Embezzlement, obtaining property by false pretenses, usury, shady security dealings, tax evasion, monopolies, and other misconduct, not *against*, but *by means of*, property—"white collar crimes," as he calls them—are universally undervalued. Another underrated value is the wilful destruction of one's own property which has an anti-social value high enough so that it should always constitute a crime and not

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<sup>2</sup> 14 Queen's Bench Division 273 (1884).